7-0900-16284-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of the Combination Administrative Penalty Order Issued to Capitol Hill Associates, Inc.	**RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION**

The above-entitled matter is before Administrative Law Judge Richard C. Luis on a motion for summary disposition. On January 18, 2005, the Department of Health ("the Department") moved for summary disposition. The Respondent, Capitol Hill Associates, Inc. ("Capitol Hill"), filed a reply disputing the statutory authority of the Department and asserting that the Respondent was statutorily exempt. Responsive pleadings from both parties were filed with the Office of Administrative Hearings (OAH). The record on this motion closed on January 31, 2005.

Jocelyn F. Olson, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota, 55101-2130 represents the Department.

Thomas E. Keliher, Senior Vice President of Capitol Hill Associates, Inc., 525 Park Street, Suite 310, Saint Paul, Minnesota 55103, represents Capitol Hill.

Based upon all of the filings in this case, and for reasons set out in the Memorandum which follows:

IT IS RECOMMENDED:

1. That the Department's motion for summary disposition be GRANTED.

2. That the Combination Administrative Penalty Order Issued to Capitol Hill Associates, Inc. by the Minnesota Department of Health for violations of Minn. Rules 4620.0500, subp. 1 and 4620.0955, subps. 1 and 2, including an administrative penalty of $2,700.00, be AFFIRMED, with $500.00 of that penalty being forgivable and the remaining $2,200.00 being nonforgivable.

Dated this 2nd day of March, 2005.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Health ("the Commissioner") will make the final decision after a review of the record. The Commissioner may adopt, reject or modify this Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Dianne Mandernach, Commissioner of Health, 85 East Seventh Place, Suite 400, Saint Paul, Minnesota 55101, telephone (651) 215-5813, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law

MEMORANDUM

In 1975, the Minnesota Legislature enacted the Clean Indoor Air Act ("MCIAA") which imposed regulations on permissible smoking inside of buildings.[1] As part of the legislation, the Department was authorized to adopt rules enforcing the MCIAA.[2]

The Department adopted rules in 1976, which were amended in 1980.[3] A number of statutory changes were made to the MCIAA, and the Department further amended its rules in 1994 to conform with the statutory changes. The Legislature amended the MCIAA in both 1999 and 2002 to increase the regulation of smoking in workplaces.[4]

The Department initiated rulemaking in this area in 2001. In 2002, the Legislature prohibited adopting rule changes that affected restaurants and bars, absent express statutory authorization. By its own terms, the session law did not apply to rules regulating smoking in office buildings.[5] On September 6, 2002, the Department filed its amended rules with the Secretary of State.[6] Among the adopted rules was the requirement that any smoking-permitted office be ventilated to certain standards that exhaust air outdoors and not permit recirculation of that air to nonsmoking areas.[7]

The Department received complaints that Capitol Hill's office allowed smoking and was not ventilated as required by the Department's rules. These complaints were submitted from persons in an adjacent office suite to that occupied by Capitol Hill.

These persons indicated that tobacco smoke was being ventilated into their office area from Capitol Hill's office suite.[8]

The Department investigated the complaints and identified Capitol Hill as the responsible party.[9] After efforts to obtain voluntary cessation of smoking in the office suite proved unsuccessful, the Department issued a correction order for failing to comply with the MCIAA and the applicable rules.[10] Under the terms of the correction order, Capitol Hill had thirty days to comply with the MCIAA and applicable rules, or face sanctions.

Capitol Hill responded by asserting that the MCIAA exempted private offices from the Department's rules. Capitol Hill indicated that no change would be made to prohibit smoking in the office suite or install ventilation equipment. On May 18, 2004, the Department reiterated that failure to comply would result in further enforcement action, including a civil penalty of up to $10,000.[11]

After notice of continued noncompliance by Capitol Hill, the Department convened a penalty forum that calculated penalties for failing to provide signage and permitting smoking without required ventilation. Based on the factors in the Department's penalty matrix, the signage violation was assigned a forgivable fine of $500. The ventilation violation was assigned a nonforgivable penalty of $2,000. A nonforgivable upward adjustment of $400 was made due to the willfulness of the violation.[12]

On September 3, 2004, the Department issued a Combination Administration Penalty Order that required Capitol Hill to correct the MCIAA violations and pay the penalty of $2,900 ($500 of which was forgivable). Capital Hill appealed the Penalty Order on September 18, 2004, and this contested case was initiated.

The Department moved for summary disposition, asserting that there were no facts in dispute and that the Department was entitled to resolution of this matter in its favor as a matter of law. Capitol Hill responded that the Department lacked the statutory authority to adopt its ventilation rules. This response effectively requests summary disposition in favor of Capitol Hill and has been treated as a cross-motion for summary disposition.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[13] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial branch courts in considering motions for summary disposition regarding contested case matters.[14] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[15]

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[16] The existence of a

genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[17] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[18]

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party.[19] All doubts and factual inferences must be resolved against the moving party.[20] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[21]

Undisputed Facts

The parties agree as to the essential underlying facts. The building containing Capitol Hill's office suite has signage indicating that it is a "smoke-free" building. The smoking in Capitol Hill's office suite is occurring in a single office, occupied by a single person, and the door of that office is kept closed. Capitol Hill acknowledged that the occupant of that office smokes in that office. Capitol Hill admits that there is no ventilation system for its office suite that meets the requirements of Minn. Rule 4620.0955, subp. 2. Capitol Hill continues to assert that it has the right to allow smoking in its office suite consistent with the terms of the MCIAA.

The Department has included evidence that smoke from Capitol Hill's suite is accumulating in the adjacent office suite. The occupants of that office suite have complained to the Department that the smoke from Capitol Hill's suite is affecting their health. Capitol Hill has asserted that there are no employees in close proximity to the source of the smoke. No evidence has been submitted to support that assertion.

Regulation of Office Smoking under the MCIAA

The Department cites the MCIAA and its rules in support of its contention that summary disposition is appropriate in this matter. The Department maintains that the only material facts are not in dispute and the rule requirements are clear. The Department relies on its authority to adopt rules under the MCIAA. Those rules, set out in Minn. Rules Chapter 4620, impose specific requirements deriving from the general outline of the MCIAA. The rule requirement forming the basis for the alleged violation is Minn. Rule 4620.0955, subp. 1.A., which states:

> Subpart 1. General. Smoking is prohibited in all offices and factories, warehouses, or similar places of work, except:
>
> > A. in a private enclosed office if the door is kept closed while smoking occurs and it meets the requirements of subpart 2, items B to E; ….

Capitol Hill asserts that it meets this requirement because the smoking occurs in a private enclosed office and the door is kept closed. Capitol Hill acknowledges that it does not comply with the requirements of Minn. Rule 4620.0955, subp. 1, items B through E. These requirements do not apply, according to Capitol Hill, because the rule exceeds the Department's statutory authority.

Rulemaking Authority under the MCIAA

The MCIAA grants rulemaking authority to the Department that reads as follows:

> (a) The state commissioner of health shall adopt rules necessary and reasonable to implement the provisions of sections 144.411 to 144.417, except as provided for in section 144.414.[22]

Minn. Rule 4620.0955 was adopted after a hearing before an Administrative Law Judge (ALJ). The ALJ issued a Report in which the statutory authority to adopt the more stringent ventilation standards (including those in proposed chapter 4620.0955) was analyzed.[23] The ALJ approved the rule at issue in this matter and that rule was adopted by the Department.[24] No appellate challenge to the rule appears in the record of this motion.

The Department was granted express statutory authority to adopt rules implementing the MCIAA. These rules were found to be needed and reasonable. The Department has shown that there is no issue of material fact regarding its ventilation requirements for offices where indoor smoking is permitted.

Capitol Hill asserts that the express statutory authorization for smoking in private offices precludes application of the ventilation restrictions. In support of this argument Capitol Hill cites Minn. Stat. § 144.414, which states in pertinent part:

> Subdivision 1. Public places. No person shall smoke in a public place or at a public meeting except in designated smoking areas. This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the place. Furthermore, this prohibition shall not apply to places of work not usually frequented by the general public, except that the state commissioner of health shall establish rules to restrict or prohibit smoking in factories, warehouses, and those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.

The statute prohibits smoking in public places, with some listed exceptions. The statute goes on to authorize smoking in workplaces not frequented by the public. Capitol Hill maintains that this statutory language authorizes its practice of allowing smoking in a private office.

The Department points out that the authorization in Minn. Stat. § 144.414 is subject to an exception. The exception expressly authorizes the Department to "restrict or prohibit smoking in … those places of work where the close proximity of workers or

the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees."

By its terms, the exception to the smoking prohibition does not apply when other workers are in close proximity, or the ventilation system is inadequate. If either situation is shown to exist under undisputed facts, the exception does not apply to Capitol Hill as a matter of law. Capitol Hill asserted that the complaining employees were not in close proximity to the indoor smoking. The documents in the record identify these employees as being in the adjoining office suite. To demonstrate that material issues of fact remain for hearing, Capitol Hill cannot rely on bare assertions. Since Capitol Hill has not introduced any evidence to show that "adjoining" is not in close proximity to Capitol Hill's office suite, no factual question remains on that issue.

The Department has defined in rule what constitutes an adequate ventilation system. Capitol Hill has admitted that it does not have a compliant ventilation system. Capitol Hill does not dispute that complaints from employees in the same building allege health problems and discomfort from smoking in Capitol Hill's office suite. Under the undisputed facts present in this matter, Capitol Hill is not exempt from the workplace smoking prohibition under both the proximity and ventilation standards.

Signage

The Department also cited Capitol Hill for violation of Minn. Rule 4620.0500, subp. 1, which required signage indicating the location of "smoking permitted" areas inside a building. Capitol Hill maintains that the rule applies only to the publicly accessible portions of the building and not its private office suite. The rule states:

> Subpart 1. Posting. To advise persons of the existence of acceptable nonsmoking and smoking-permitted areas, "No Smoking" and "Smoking Permitted" signs must be posted according to this part. In addition, the statement "Smoking is prohibited except in designated areas" or a similar statement must be conspicuously posted on or immediately inside of all outside entrances to a public place.[25]

Capitol Hill maintains that the reference to "public place" in the last sentence of the rule limits the responsibility for signage to the building entrance. This interpretation is not supported by the language of the subpart or the remainder of the rule.

The purpose of the signage is to inform the public regarding the smoking status of the building and any portion of the building where smoking may be occurring. The public is not alerted when only the building entrance is posted. In this matter the building is posted as being smoke free. The building owner has sought compliance from Capitol Hill with this designation.[26] Since Capitol Hill has chosen to allow smoking in its office suite, Capitol Hill has an obligation to comply with Minn. Rule 4620.0500, subp. 1 (in addition to the ventilation standards of Minn. Rule 4620.0955). There is no genuine issue of material fact regarding Capitol Hills' failure to post signage required by the rule.

Penalty Amount

Capitol Hill disputed the propriety of the penalty amount arrived at by the Department. Violations identified in the MCIAA are petty misdemeanors, which Capitol

Hill indicates has a maximum fine of $1000.[27] The Department points out that it is not proceeding under the criminal code, but under its penalty authority established by Minn. Stat. §§ 144.989 to 144.993. Minn. Stat. § 144.991, subd. 1, expressly includes MCIAA enforcement under this penalty authority. The Department has placed evidence in the record, undisputed by Capitol Hill, that its penalty calculation procedures were followed to arrive at the penalties in this matter.[28] No genuine issue of fact regarding the penalties has been raised by Capitol Hill.[29] In an affidavit attached to the Department's motion, the nonforgivable portion of the penalty was adjusted to $2,200, from $2,400, to correct an earlier error in the computation.[30]

Pending Legislation

Capitol Hill submitted a copy of House File No. 405, which as been introduced at the Legislature in the current session. This bill would extend the ban on smoking in the MCIAA to workplaces and extinguish the exemption that Capitol Hill has claimed in this matter. Capitol Hill asserts the proposed legislation demonstrates that the intent of the Legislature was to allow the smoking that Capitol Hill has permitted in its office suite. The Department points out that the legislation would merely eliminate the exceptions currently existing under the Department's rules. Proposing to enact more stringent requirements does not compel the conclusion that imposing less stringent requirements was originally intended.

Conclusion

The Department has demonstrated that Capitol Hill has failed to meet the ventilation standards, the proximity standards, and the signage standards applicable to any private office under the MCIAA and the Department's rules. These violations exist as a matter of law and no genuine issue of material fact remains to be heard in this matter. For that reason, the Administrative Law Judge has recommended that summary disposition for the Department be granted. No recommendation has been made regarding the imposition of costs, because no factual basis was presented on that issue.

R.C.L.

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[1] Minn. Stat. § 144.411, *et seq*.; Laws of Minnesota 1975, Chap. 211, Sec. 1.
[2] Minn. Stat. § 144.417.
[3] Affidavit of Croteau-Kallestad, Ex. 1.
[4] *Id*.
[5] Laws of Minnesota 2002, Chap. 375, Art. 3, Sec. 7.
[6] Affidavit of Croteau-Kallestad, Ex. 7.
[7] Minn. Rule 4620.0955, subp. 2.
[8] Affidavit of Croteau-Kallestad, Ex. 9.
[9] Affidavit of Croteau-Kallestad, Ex. 11, at 1.
[10] *Id*., Ex. 11.
[11] Affidavit of Croteau-Kallestad, Ex. 13.
[12] *Id*., Ex. 14.
[13] ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500K; Minn.R.Civ.P. 56.03.
[14] *See*, Minn. Rules, pt. 1400.6600.

[15] ***Illinois Farmers Insurance Co. v. Tapemark Co.***, 273 N.W.2d 630, 634 (Minn. 1978); ***Highland Chateau v. Minnesota Department of Public Welfare***, 356 N.W.2d 804, 808 (Minn. App. 1984).
[16] ***Thiele v. Stitch***, 425 N.W.2d 580, 583 (Min.. 1988); ***Hunt v. IBM Mid America Employees Federal***, 384 N.W.2d 853, 855 (Minn. 1986).
[17] *Id*.; ***Murphy v. Country House, Inc.***, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); ***Carlisle v. City of Minneapolis***, 437 N.W.2d 712, 75 (Minn. App. 1988).
[18] ***Carlisle***, 437 N.W.2d at 715 (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)).
[19] ***Ostendorf v. Kenyon***, 347 N.W.2d 834 (Minn. App. 1984).
[20] *See, e.g*., ***Celotex***, 477 U.S. at 325; ***Thiele***, 425 N.W.2d 580, 583; ***Greaton v. Enich***, 185 N.W.2d 876, 878 (Minn. 1971); ***Thompson v. Campbell***, 845 F. Supp. 665, 672 (D. Minn. 1994).
[21] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250-51 (1986).
[22] Minn. Stat. 144.417, subd. 1(a). Subdivision 1(b) of that statute precludes some rules from taking effect, but that statute expressly exempts rules concerning smoking in offices from the preclusion. *See* Minn. Stat. 144.417, subd. 1(b).
[23] Affidavit of Croteau-Kallestad, Ex. 4 (***ITMO the Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air***, OAH Docket No. 1-0900-14601-1 (Report issued March 21, 2002)).
[24] Affidavit of Croteau-Kallestad, Ex. 6.
[25] Minn. Rule 4620.0500, subp. 1.
[26] Affidavit of Croteau-Kallestad, Ex. 9.
[27] Capitol Hill Brief, at 4. The ALJ notes that the maximum fine for petty misdemeanors is $300. *See* Minn. Stat. §§ 609.02, subd. 4a, 609.0331, and 609.0332.
[28] Affidavit of Croteau-Kallestad, Ex. 14.
[29] At the December 6, 2004 prehearing conference held in this matter, Capitol Hill indicated that it had suspended smoking in its offices pending the resolution of this matter. If such a suspension was carried out, it could have an impact on the amount of penalty to be imposed. Since no evidence was provided regarding any cessation of smoking in the record of this motion, the impact of any such change has not been discussed. This issue is appropriate for argument to the Commissioner.
[30] Department Memorandum, at 10; Affidavit of Croteau-Kallestad, at 6.